Beyond the MPIA: A Rule-based Solution to the Appellate Body Crisis

Henry Gao

Abstract

The World Trade Organization's dispute settlement mechanism is facing a significant crisis due to the ongoing blockage of Appellate Body Member appointments by the United States (US). To address the US obstruction, several proposals have been suggested, with the most notable being the Multiparty Interim Appeal Arbitration Arrangement (MPIA), initiated by key Members including the European Union and China. After an in-depth examination of the MPIA from both theoretical and practical angles, this paper argues that the MPIA does not effectively resolve the Appellate Body crisis due to its numerous shortcomings. Instead, it proposes appointing Appellate Body members through majority voting in the WTO General Council, which is already provided in the existing rules of the WTO. The paper concludes by emphasizing that only such a rules-based solution can resolve the current Appellate Body crisis and prevent future attempts to undermine the WTO dispute settlement system.

Introduction

For the past five years, the World Trade Organization (WTO) Appellate Body has been paralysed due to the persistent blockage of the appointment of its members by the United States. In view of this, several WTO members sought alternatives to resolve trade disputes. Drawing from ideas from former Director of the Legal Affairs Division of the WTO Secretariat Pieter Jan Kuijper,[1] Sidley Austin lawyers who are also former staff members of the Appellate Body Secretariat,[2] and former member of the Appellate Body James Bacchus,[3] the European Union (EU) and Canada launched an interim appeal arbitration system under Article 25 of the WTO's Dispute Settlement Understanding (DSU) on July 25, 2019.[4] A similar arrangement was made between the EU and Norway in October 2019.[5]

When the Appellate Body became fully paralyzed in December 2019, the EU shifted its focus from bilateral agreements to a broader multi-party system. On January 24, 2020, the EU and 16 WTO members announced their intention to create a multi-party interim appeal system based on

Article 25 of the DSU.[6] This arrangement would act as a temporary solution until the Appellate Body could be reformed and made operational again.

By March 27, 2020, the EU and 15 other members had reached a formal agreement on the Multiparty Interim Appeal Arbitration Arrangement (MPIA).[7] This was officially notified to the WTO on April 30, 2020, putting the MPIA into effect.[8] On July 31, 2020, the participating countries notified the WTO of the appointed arbitrators, marking the start of the arrangement. On December 21, 2022, the first MPIA arbitration award was issued in the case of Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands (DS591).[9]

I. A Strange Animal

While it is an interesting experiment, the MPIA is also a strange animal as it embodies many contradicting elements, including the following:

First, it's not clear whether the MPIA operates within or outside the WTO system. Early proposals like Kuijper's envisioned it as an external solution, while others, such as the Sidley and Bacchus proposals, based it on Article 25 of the WTO's Dispute Settlement Understanding (DSU). The MPIA ultimately followed the latter approach, seeking to anchor itself in the WTO system by tying it to Article 25. It was formally notified to the WTO's Dispute Settlement Body (DSB) as an addendum to the "Statement on a mechanism for developing, documenting and sharing practices and procedures in the conduct of WTO", which was first proposed by Canada in 2016 as a voluntary initiative to "foster a more organic evolution of dispute settlement practices."[10]

However, simply paying lip service to WTO dispute settlement provisions and procedures does not automatically validate its legitimacy. The language in Article 25 is laconic and leaves many details of the Arbitration mechanism unclear. The only thing certain is that it is supposed to be a voluntary arrangement, as both the resort to arbitration and the acceptance of the final arbitration reward are subject to mutual agreement of the parties. Such voluntary nature is confirmed by Article 15 of the Agreed Procedures for the MPIA, which further confirms that arbitral award shall only "be notified to, but not adopted by, the DSB". This is very different from the compulsory nature of the normal WTO dispute settlement process, which grants to panel and Appellate Body reports the full support of all WTO Members through the adoption of these reports by the DSB. In contrast, the MPIA arbitral award is only binding among the disputing parties in a specific case, but it does not bind other WTO Members, or even the same parties in future disputes. In many regards, it is similar to mutually agreed solution (MAS) in WTO disputes, which, given the checkered compliance record of MAS, does not bode well for the future of the MPIA as a suitable dispute settlement mechanism.

Second, it is equally unclear as to whether the MPIA is meant to appease or further aggravate the US. On the one hand, many of the clauses in the MPIA do address specific concerns of the US on the Appellate Body. For example, by stating that the arbitrators shall only address those issues that "are necessary for the resolution of the dispute" or "have been raised by the parties", Art. 10 of the Agreed Procedures follows the US position against the issuance of obiter dicta or advisory opinion by the Appellate Body. Similarly, the problem of the Appellate Body exceeding

the 90-day limit is addressed by Art. 12. To make sure that the award may be issued within the 90 day time-period, Art. 13 also provides the arbitrators power to exclude claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU.

II. Reactions from the US

Despite the concessions made in the design of the MPIA, the United States has remained skeptical and, at times, openly hostile toward it. This opposition is rooted in fundamental differences in how the U.S. views the World Trade Organization (WTO) dispute settlement process, particularly regarding the appellate system.

First, the U.S. opposes the very idea of a two-level adjudication mechanism. Historically, the U.S. has had a conflicted relationship with the WTO's Appellate Body. In 2003, Robert Lighthizer, nominated alongside Merit Janow for a position on the Appellate Body, expressed a certain respect for the institution. He stated that he intended to bring a "strict constructionist's perspective" to strengthen the Body, rather than dismantling it. However, after failing to secure the position, Lighthizer's view shifted. By the time he became U.S. Trade Representative (USTR) in 2017, he was widely expected to challenge the WTO and the Appellate Body in particular, seeking to curb what he saw as problematic rulings.

Lighthizer's opportunity came when he realized that blocking new appointments could effectively paralyze the Appellate Body. His broader goal, however, became clearer in an August 2020 op-ed for the Wall Street Journal,[11] where he argued that the WTO's dispute settlement system should be overhauled. He proposed replacing the current two-tier system with a single-stage process akin to commercial arbitration, where ad hoc panels resolve disputes swiftly. In this context, it is easy to see why the U.S. would reject the MPIA, which it views as a kind of "ersatz Appellate Body" that "incorporates and exacerbates some of the worst aspects of the Appellate Body practices".[12]

Second, the U.S. is staunchly opposed to making MPIA decisions binding, particularly as "precedents" for future cases. In earlier bilateral arrangements between the EU and countries like Canada and Norway, efforts were made to preserve the precedential value of interim appeal arbitration decisions. These arrangements explicitly stated that the awards would be treated as Appellate Body reports, thereby maintaining their authority for interpreting WTO agreements. However, this language was dropped in the MPIA's final version, likely due to U.S. objections.

Lighthizer reiterated this opposition in his Wall Street Journal op-ed, where he argued that rulings from "these one-off panels should apply only to the parties in the dispute, and not become part of an ever-evolving body of free-trade jurisprudence". The U.S. believes that binding precedents create an evolving and increasingly complex jurisprudence that undermines its trade policy. On the other hand, the very point of binding precedents is to create consistency and predictability in the WTO's legal framework. Without a uniform set of legal standards, an appeal mechanism risks generating even more conflicting rulings, exacerbating the existing challenges within the WTO's panel-level decisions.

III. Constitutional Problems

The MPIA faces several significant constitutional challenges that may undermine its long-term viability. These "birth defects" raise fundamental issues about its compatibility with the WTO system and its overall fairness. Here are some of the key concerns:

1. Denial of WTO Members' Right to Appeal

One of the MPIA's main flaws lies in its restriction on WTO members' rights to appeal under the WTO Dispute Settlement Understanding (DSU). Article 2 of the MPIA states that participating members "will not pursue appeals under Articles 16.4 and 17 of the DSU" when they resort to the MPIA. The mandatory nature of this prohibition is unclear. If it is indeed mandatory, then it would violate the right to appeal guaranteed under Art. 16.4 of the DSU, as well as the broad requirement that the Members "shall have recourse to, and abide by, the rules and procedures of this Understanding" as per Art. 23.1 of the DSU.

On the other hand, if the prohibition isn't mandatory, the MPIA could fall apart if a member chooses to "appeal into the void" by submitting an appeal to the defunct Appellate Body after losing in MPIA arbitration. This legal uncertainty puts the entire MPIA framework on shaky ground.

2. Binding Nature of MPIA Awards

The binding nature of MPIA awards also presents a constitutional dilemma. While the MPIA has retreated from earlier ambitions to create binding precedents, its awards are still binding on the parties involved in the dispute. This creates a problematic inconsistency. Under the original design of the DSU, panel and Appellate Body decisions only become binding when adopted by the Dispute Settlement Body (DSB), a political body composed of all WTO members. However, the MPIA explicitly states that its awards are only notified to the DSB and not adopted by it. Instead, as made clear by the Agreed Procedures, an award only becomes binding because the parties agree to abide by it.

This creates a logical problem, as even the Appellate Body decision needs DSB adoption to become binding, yet an interim mechanism like the MPIA would be binding without adoption by the DSB. Some might brush off this concern as mere semantics, but there is more to that. The requirement for the adoption of Appellate Body report by the DSB implies that there is always a possibility, however slight it might be, for not adopting the report. Yes, an MPIA award, by getting rid of the requirement for DSB adoption, also made it impossible for the disputing parties to reject the award. In this sense, we could say that the MPIA, as an extra-WTO mechanism, is more binding than the Appellate Body.

Defenders of the MPIA may compare it to the WTO's Mutually Agreed Solution (MAS), which is also binding only between the parties. However, the MAS does not interfere with panel decisions, whereas the MPIA can "uphold, modify, or reverse" panel rulings, which are issued by a body established by the DSB. In other words, the MPIA, as an arrangement between two WTO

Members who are parties to a specific dispute, could change the decisions of the panel, an institution that is duly established by the DSB, which is composed of all WTO Members.

3. Asymmetrical Withdrawal Rights

It could be argued that the discussions above give too much credit to the "binding" nature of MPIA awards, as an MPIA disputant can always withdraw from the arbitration and return to the normal WTO dispute settlement process. However, according to Article 18 of the Agreed Procedures of the MPIA:

"*At any time during the arbitration, the appellant, or other appellant, may withdraw its appeal, or other appeal, by notifying the arbitrators. This notification shall also be notified to the panel and third parties, at the same time as the notification to the arbitrators. If no other appeal or appeal remains, the notification shall be deemed to constitute a joint request by the parties to resume panel proceedings under Article 12.12 of the DSU. If an other appeal or appeal remains at the time an appeal or other appeal is withdrawn, the arbitration shall continue."*

This means that, in practice, only "the appellant, or other appellant", may "withdraw its appeal" "at any time during the arbitration". Such withdrawal can happen even until the arbitration award is out, or at least the last minute before the award is out, when the parties already have some pretty good guess/idea about the result of arbitration. This can be illustrated with two possible scenarios. In the first scenario, if the MPIA arbitration panel rules for the Appellant, the Appellant will not withdraw from the arbitration but choose to continue. As the Appellee loses the arbitration, its most rational action is to withdraw from the arbitration, but it won't be able to do so as such right is not provided under the MPIA. Thus, the process continues and the MPIA panel decision stands, which means the Appellant wins the arbitration.

On the other hand, if the MPIA arbitration panel rules against the Appellant, the most rational action for the Appellant is to withdraw from the arbitration. Now the Appellee would want to continue the arbitration but it won't be able to do so, again as such right is not provided under the MPIA. It would not be able to file a separate appeal either as the 10 day time limit has already expired. Thus, the arbitration is terminated and the original panel decision stands, which means the Appellant still wins. In other words, if the other party does not file an appeal, we'd have a bizarre situation that the Appellant always wins.

One may argue that this rule is simply copied from Article 30.1 of the Working Procedures for Appellate Review. In practice, the Appellate Body has remedied the problem through its report in *EC - Sardines*, by stating that "the right to withdraw an appeal must be exercised subject to these limitations" such as "fair, prompt and effective resolution of trade disputes" or "good faith".[13] However, it is unclear as to whether such jurisprudence could be followed by the MPIA, because first of all, such Appellate Body ruling is just *obiter dicta*; and second, as the MPIA is essentially premised on bilateral agreements, it is unclear whether the disputing parties do have rights as under a multilateral agreement, especially if such "rights" could directly affect the interests of the other party.

4. Potential for Unilateral Retaliation

Further evidence of the MPIA's bilateral nature comes from an amendment to Regulation (EU) No. 654/2014, introduced by the European Commission in December 2019. This amendment allows the EU to impose retaliatory tariffs when the other party in a dispute attempts to "appeal into the void" by filing an appeal to the defunct Appellate Body, while refusing to join MPIA arbitration. This regulation, adopted in April 2020, effectively forces other WTO members into accepting the MPIA under the threat of unilateral sanctions.

This practice blatantly violates the WTO's prohibition on unilateral measures under Article 23.1 of the DSU. However, the economic clout of the EU ensures its effectiveness, and it's likely that other major trading nations in the MPIA may follow suit, either by enacting similar regulations or adopting similar practices. In doing so, the MPIA risks unleashing a wave of unilateralism, undermining the multilateral principles the WTO was built on. Ironically, in attempting to preserve the appellate process, the MPIA parties may be contributing to the weakening of the very system they seek to protect.

In conclusion, the MPIA suffers from fundamental contradictions that not only question its constitutional legitimacy but also create practical challenges. By limiting members' rights to appeal, imposing binding awards outside of the DSB framework, and encouraging unilateral retaliation, the MPIA risks undermining the broader WTO system. Without addressing these issues, the arrangement may prove unsustainable in the long run, exacerbating existing tensions within the international trading system rather than resolving them.

IV. A rule-based true solution

The various issues plaguing the MPIA do not mean that there is no solution to the Appellate Body crisis. In fact, a solution exists within the existing framework of the WTO and does not require the creation of new rules or institutions. The solution lies in appointing Appellate Body members through a majority vote at the General Council, a mechanism already provided for under Article IX.1 of the WTO Agreement.

The legal foundation for this approach is found in Article IV of the WTO Agreement, which grants the Ministerial Conference the authority to make decisions on all matters related to the Multilateral Trade Agreements. Since the General Council functions on behalf of the Ministerial Conference between its sessions, it similarly has the authority to make decisions on all such matters, including appointments to the Appellate Body.

This proposal leverages the WTO's existing legal structure without the need for new arrangements like the MPIA. By utilizing the majority voting provision under Article IX.1, WTO members could overcome the U.S. blockage of Appellate Body appointments and restore the proper functioning of the dispute settlement system.

V. The Consensus Challenge

Critics of appointing Appellate Body members by majority vote argue that decision-making

must follow the consensus rule, as outlined in the Dispute Settlement Understanding (DSU). This argument stems from Article IV.1 of the WTO Agreement, which stipulates that decisions must be made "in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement." In turn, Article 2.4 of the DSU states that decisions of the Dispute Settlement Body (DSB) must be made by consensus. Thus, they claim, even if the General Council takes up the matter, the consensus rule should still apply.

This view, however, misinterprets key aspects of the WTO framework:

1. Consensus Rule Applies Only to the DSB, Not the General Council

The consensus decision-making rule in Article 2.4 of the DSU applies only when decisions are taken by the DSB. Moving the matter to the General Council, as proposed, should not automatically subject the General Council to the same consensus rule. Doing so would fundamentally alter the language of Article 2.4, essentially broadening it to say that decisions by "any WTO body" relating to dispute settlement must be by consensus. This is not what the drafters intended.

Moreover, Article IV.3 of the WTO Agreement clarifies that the General Council only acts as the DSB when convened explicitly for that purpose. If the General Council addresses the Appellate Body appointment matter without convening as the DSB, it should not be bound by the DSB's consensus rule. Arguing otherwise would blur the distinction between the General Council and the DSB, which are legally distinct bodies with different responsibilities.

2. The Meaning of Article IV.1 of the WTO Agreement

Detractors focus heavily on the second part of Article IV.1—which requires decisions to follow the rules of relevant agreements like the DSU—but they ignore the first part, which states that decisions should also adhere to the WTO Agreement. The addition of the phrase "in this Agreement" suggests that the General Council is not limited by the decision-making rules of specialized agreements like the DSU.

If a conflict arises between the decision-making rules of the WTO Agreement and those in a Multilateral Trade Agreement (like the DSU), Article XVI.3 of the WTO Agreement provides that the WTO Agreement prevails. Thus, if the General Council takes up the appointment of Appellate Body members, it can rely on majority voting, as permitted by the WTO Agreement's broader decision-making framework under Article IX.

3. Object and Purpose of the DSU

The object and purpose of the DSU, as set out in Article 3.2, is to ensure "security and predictability" in the multilateral trading system and the "prompt settlement" of disputes. By blocking the appointment of Appellate Body members, the U.S. has paralyzed this crucial aspect of dispute resolution, violating the DSU's objectives. The U.S. approach risks destabilizing the entire multilateral trading system by undermining its predictability.

Moreover, the U.S. seems to favor replacing the two-tier dispute settlement system with a single-stage process resembling commercial arbitration. This would be a significant departure from the DSU and its aim of maintaining a balance between members' rights and obligations. By failing to invoke the existing majority voting mechanism, other WTO members are, in effect, enabling the U.S. to dismantle the Appellate Body and the carefully negotiated dispute settlement process.

Conclusion

The claim that appointing Appellate Body members through a majority vote violates WTO rules is based on a flawed reading of both the DSU and the WTO Agreement. The consensus rule applies to the DSB, not the General Council. Moving the issue to the General Council allows the use of the majority voting mechanism provided for in the WTO Agreement, which offers a legal and effective solution to restore the Appellate Body. By failing to act, other WTO members risk aiding in the destruction of the institution, thus jeopardizing the entire dispute settlement system.

VI. The Voting Phobia

Another reasons why many WTO members and experts have ignored or dismissed the voting option as untenable is due to a deep-seated collective phobia of voting, which stems from a long tradition of institutional stigmatization. This tradition, which promotes consensus as the preferred mode of decision-making, stems from several factors:

1. Institutional Stigmatization of Voting

Voting is often viewed as a last resort, to be avoided unless absolutely necessary. The 1992 Egypt case provides a clear example of this sentiment, where Egypt's suggestion to resort to voting was met with widespread criticism.[14] Countries like Switzerland and Mexico framed voting as a "nuclear option" that could disrupt the delicate balance of the WTO system. Mexico even compared it to an atomic weapon—something to be stored but not used. The underlying fear was that voting might set a dangerous precedent, encouraging its future use in contentious situations, which could fracture the unity of WTO members.

This slippery slope argument, however, assumes that consensus is always within reach, and that voting would harm future cooperation. In the current context, with the U.S. persistently blocking the appointment of Appellate Body members and showing no interest in reaching a consensus, this assumption no longer holds. The analogy of Mexico's "atomic bomb" is relevant here: the U.S. has already dropped the bomb by paralyzing the Appellate Body, and if other members do not use their own "nuclear option" (voting), they risk losing the dispute settlement system altogether.

2. Fear of Precedent and Institutional Instability

There is a long-standing fear that invoking majority voting could destabilize the system by

opening the door to more frequent, divisive voting practices. The concern is that if members abandon consensus in one case, they might do so in others, undermining the cooperative spirit of the WTO. This sentiment, however, ignores the fact that the WTO's decision-making framework explicitly provides for voting when consensus cannot be reached. The overreliance on consensus, often treated as a sacred norm, has historically led to deadlock, as evidenced by earlier examples like the agricultural waivers for the U.S. and EU.

In the case of the Appellate Body crisis, this phobia of voting has resulted in inaction, with members seemingly paralyzed by the fear of using a legitimate mechanism. Ironically, the refusal to vote could lead to greater long-term instability, as more members may start mimicking the U.S.'s bad-faith tactics, as seen in the blocking of the Acting WTO Director General in 2020[15] and the suspension of a DSB meeting due to the Philippines-Thailand trade dispute.[16]

3. The Danger of Complacency with Temporary Solutions

The MPIA, while providing a temporary stopgap for WTO members seeking appellate review, presents its own risks. Though the MPIA helps fill the gap left by the dysfunctional Appellate Body, its very existence could prolong the crisis. If WTO members become too comfortable with this interim measure, they may lose the incentive to push for the restoration of the Appellate Body proper. The longer the MPIA is in place, the more it risks becoming a permanent fixture—just as temporary measures like the agricultural waivers became entrenched in GATT.

The danger here is that the WTO's two-stage dispute settlement system, considered an "extraordinary achievement," could be permanently replaced by a less effective, ad hoc system like the MPIA. As time goes on, the urgency to resolve the Appellate Body crisis diminishes, and members may accept this erosion of the system as the new normal.

4. Normalization of U.S. Obstructionism

As the Appellate Body impasse drags on, the U.S.'s blocking tactics risk becoming normalized. The longer WTO members tolerate the U.S.'s actions without taking decisive countermeasures, such as invoking a majority vote, the more likely it is that other members will follow suit. This "broken window" effect is already becoming evident, as seen in India's blockage of the plurilateral joint statement initiatives.

If the international community fails to act decisively, it risks a wider breakdown in WTO governance, where bad-faith actors can continually exploit consensus-based decision-making to paralyze the institution. The U.S. has demonstrated that refusing to join consensus can effectively block action on vital issues, creating a dangerous precedent for other members to do the same.

VII. Concluding Thoughts

When the United States initially raised objections over the Appellate Body appointments three years ago, many within the WTO found the action illegal and shocking, viewing it as a violation of the rules-based system the organization represents. However, over time, the sentiment

among WTO members has evolved, with a growing number showing sympathy toward the U.S. position. This shift is notably reflected in WTO Director General Robert Azevedo's remark in 2018: "This guy comes along, and he begins to shake the tree pretty hard. So let's make sure that some fruits fall."[17] The implication was that the U.S. challenge, while extreme, was necessary to spur reflection and reform within the Appellate Body and the dispute settlement system as a whole.

Despite the legitimacy of some of the U.S.'s substantive grievances about the functioning of the Appellate Body, the approach it has taken—blocking appointments—remains inappropriate and damaging. The U.S. has escalated the situation, moving from seeking reforms to expressing a desire to fundamentally dismantle the Appellate Body. This shift became clear with U.S. Trade Representative Robert Lighthizer's recent statements, which make it evident that the U.S. is not merely interested in reforming the system; it seeks to "kill the tree" entirely, signalling a preference for dismantling the two-tier dispute resolution process altogether.

In response to the Appellate Body paralysis, various proposals have emerged, with the MPIA being the most notable and functional at present. While the MPIA is intended to offer a temporary workaround, it is fraught with constitutional and practical flaws. As I've discussed earlier, the MPIA's creation of an extra-WTO appeal framework sets a dangerous precedent, potentially undermining the integrity of the multilateral system by fragmenting dispute resolution processes. Moreover, it risks creating a false sense of security—a band-aid solution that deflects attention from the need for a lasting fix, while simultaneously eroding the political will among WTO members to pursue true reform.

The proper solution lies in invoking majority voting at the General Council to break the deadlock over Appellate Body appointments. While the WTO's rules explicitly provide for this option, it has been consistently overlooked due to a deep-rooted fear of voting—an "irrational" phobia ingrained in the organization's culture. This aversion to voting is so strong that members prefer to endure the paralysis of the system rather than trigger a vote. However, without overcoming this fear and invoking the existing rules on majority voting, the WTO will remain unable to confront the obstructionist tactics employed by the U.S., or any other member that might follow the same path in the future.

While WTO members procrastinates, hoping for a resolution through consensus, the damage to the dispute settlement system deepens. The very institution that has been a cornerstone of the multilateral trading system for the past 30 years—the two-tier dispute resolution mechanism—is at risk of being irreparably harmed. If members continue to shy away from the voting option and instead place their faith in temporary fixes like the MPIA, the U.S. will continue its efforts to dismantle the Appellate Body, and the "miracle tree" that once symbolized the success of the WTO's dispute settlement system will be killed. We need to act decisively, by using the tools already available in the WTO Agreement, and we need to act now, before it is too late.

Henry Gao is Professor of Law at Singapore Management University and Senior Fellow at CIGI.

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